NOT FOR PUBLICATION WITHOUT APPROVAL OF THE COMMITTEE ON OPINIONS

	:	SUPERIOR COURT OF NEW JERSEY
LISA LANTERMAN	:	LAW DIVISION
	:	MIDDLESEX COUNTY
Plaintiff,	:	CIVIL ACTION
	:	DOCKET NO. MID-L-6542-99 MT
	:	CASE CODE 241
v.	:	
	:	**OPINION**
	:	
PHILIP MORRIS INCORPORATED, et al.	:	**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON THE STATUTE OF LIMITATIONS**
Defendants.	:	

Argued: July 7, 2000
Decided: May 28, 2002

Marc Edell and Dina Sforza (Edell and Associates) for Plaintiff

Karen Thompson (Norris, McLaughlin, & Marcus) for Defendants Joseph H. Stomel, Consolidated Simon Distributors, Inc., Plainfield Tobacco and Candy Co., Inc. and T.B.I. Holdings, Inc.

Ezra Rosenberg (Dechert, Price, & Rhoads) and Michael Vassalotti (Brown & Connery) for Defendant Philip Morris

CORODEMUS, J.S.C.

I. INTRODUCTION

The defendants, manufacturers and distributors of tobacco products, seek summary judgment dismissing plaintiff's complaint on the grounds that it is time barred under N.J.S.A. 2A:14-2. The issue before this Court is whether the plaintiff violated the statute of limitations or whether she should receive the benefit of the discovery rule. The plaintiff's claims of common law fraud violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2 have not been opposed by way of this motion and therefore will proceed.

In November 1993, numerous physicians told the plaintiff that her tumor and lung cancer were caused by tobacco smoke. The plaintiff claims, however, she was unaware that the tobacco

industry was at fault until four years after her diagnosis with cancer when she became aware of the States' Attorneys Generals' suits against the tobacco industry revealing documents including light cigarettes. This court finds that the plaintiff knew or should have known that there may have been a basis for a design defect claim in November 1993 when her doctors told her that smoking cigarettes had caused her cancer. The design defect claim for personal injury is dismissed. The Court, however, will not dismiss those claims based on consumer fraud or common law fraud as they have not been contested by defendants.

II. FACTUAL HISTORY

The salient facts are not in dispute. Plaintiff was diagnosed with lung cancer in November of 1993 and at that time she was advised by her treating surgeon, her oncologist, and by her radiologist that her cancer was caused by her smoking. Plaintiff began smoking at the age of sixteen (16). She smoked "Marlboro Lights " -- the cigarettes advertised as containing less tar and nicotine -- for fifteen years. According to her deposition, she first experimented with cigarettes in 1975. By 1979 (at the age of 16) the plaintiff was smoking Marlboro Lights at a rate of a pack per week. By age 20, she was smoking a pack per day and sometimes two packs per day. The plaintiff attempted to quit smoking on numerous occasions but was unsuccessful.

In November of 1993 the plaintiff was diagnosed with a malignant tumor. At that time, all of her treating doctors urged her to stop smoking. Plaintiff, however, found it difficult to quit and testified at her deposition that she still smoked occasionally until 1995. Because she could not control her desire for cigarettes, Dr. Ostergaard, the plaintiff's primary care physician, recommended that she switch to Merit Ultra Lights which appeared to have the lowest level of nicotine according to charts in his office.

It was not until the winter or early spring of 1997 that she first became aware through media reports that the Attorneys Generals of various states had commenced suit against certain tobacco manufacturers. Prior to that time, the plaintiff stated in her deposition, she was aware of the controversy about the dangers of smoking but had no knowledge as to what those dangers

might be. According to her own testimony, the advent of national litigation, rather than her own tobacco-caused-lung cancer, convinced her that there was some credibility to the charges against the tobacco companies. The plaintiff filed her claim on May 21, 1997.

III. PROCEDURAL HISTORY

Initially, plaintiff was a named class representative in a putative class action suit Cosentino v. Philip Morris MID-L-5135-97 filed on May 23, 1997 in Middlesex County. This complaint was centralized with other individual and class suits filed in New Jersey against the tobacco companies and assigned to this Mass Tort Court for pre-trial management by Order of the Supreme Court (Poritz, C.J.) dated October 14, 1997. On September 24, 1999 class certification was denied and under the terms of the Order, the individually named plaintiffs were to be severed and each was to file an individual complaint, but the original filing date of May 21, 1997 was made applicable nunc pro tunc. See also Staub v. Eastman Kodak Co. et.al. 320 N.J. Super. 34, 46-55, 726 A.2d 955, 961-66 (App. Div. 1999)(a limitations period barring a claim may be tolled during the pendency of a putative class action asserting the same claim).

Plaintiff filed her individual complaint on August 30, 1999 seeking compensatory and punitive damages as well as declaratory and injunctive relief for fraud and deceit, negligent misrepresentation, intentional infliction of emotional distress, negligence, breach of express and implied warranty, strict product liability, conspiracy and violation of the consumer fraud statute N.J.S.A. 56:8-2. An amended complaint in fourteen (14) counts was filed on October 29, 1999. On October 27, 2000 plaintiff withdrew all product liability claims based on failure to warn, proceeding solely on her claim of a manufacturing defect, consumer fraud, and common law fraud.[1]

[1] Plaintiff's claims as to respondent's post 1969 advertising or promotions grounded in state law are preempted by the Federal Cigarette Labeling and Advertising Act as amended by the Public Health Cigarette Smoking Act of 1969. 15 U.S.C.A. Sect. 1333. Therefore the failure to warn claims were subject to dismissal on preemption grounds if not withdrawn. Cipollone v. Liggett Group, Inc., et.al. 505 U.S. 504, 112 S.Ct 2608, 120 L.Ed.2d 407 (1992). No claims in this case pre-date 1969.

IV. STANDARD FOR SUMMARY JUDGMENT

The defendants, manufacturers and distributors of tobacco products, seek summary judgment dismissing plaintiff's complaint on the grounds that the plaintiff's design defect claim is time barred under N.J.S.A. 2A:14-2, which provides that:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within two years next after the cause of any such action shall have accrued. Id.

Summary judgment is proper where there is no genuine issue as to a material fact, thus entitling the defendant to judgment as a matter of law. Rule 4:46-2 provides that a court should grant summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Brill v. Guardian Life Insurance Co., 142 N.J. 520, 528-529, 666 A.2d 146, 150-151 (1995).

By its plain language, R. 4:46-2 dictates that a court should deny a summary judgment motion where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged." That means a non-moving party cannot defeat a motion for summary judgment merely by pointing to an immaterial or insubstantial fact in dispute. Brill, at 529.

The New Jersey Supreme Court in Brill went on to say "under this new Standard, a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to

permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." Id.

In considering all of the material evidence before it to determine if there is any genuine issue of material fact that precludes summary judgment, the Court must determine if there is a sufficient factual disagreement to require submission to a jury. This is accomplished by the Court, within the bounds of reason, viewing most favorably those items presented to it by the party opposing the motion. Brill, at 540. If the opposing party in a summary judgment motion offers only facts which are immaterial or of an insubstantial nature, a mere scintilla, "fanciful, frivolous, gauzy, or merely suspicious, he will not be heard to complain if the court grants summary judgment." Brill, at 529 (quoting Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75, 110 A.2d 24, 28 (1954)).

The Court in Brill, indicated that the "thrust" of its decision "is to encourage trial courts not to refrain from granting summary judgment when proper circumstances present themselves." Id., at 541. The judge's function [when presented with a summary judgment motion] is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Id., at 540 (quoting Liberty Lobby, supra. 477 U.S. 242, 249 (1986)).

On any motion for summary judgment or for partial summary judgment by the defense, the court is required to view the facts in the light most favorable to the plaintiff. Brill, 142 N.J. at 540. Therefore, for purpose of this motion, the following facts are assumed.

V. BACKGROUND

The Federal Trade Commission ("FTC") introduced a methodology for measuring the amount of tar, nicotine, and other chemical constituents of cigarette smoke as early as 1966. 31 Fed. Reg. 14,278 (Nov. 4, 1966). Up to that time each manufacturer had used a different method to measure those amounts, rendering comparison between brands impossible. The FTC

established a cigarette testing laboratory which began operation in 1967 to analyze mainstream cigarette smoke or the smoke that is drawn through the cigarette rod during puffing. 32 Fed. Reg. 11,178 (Aug. 1, 1967). In 1970, the Commission proposed a trade regulation that would have required the disclosure of tar and nicotine ratings in all cigarette advertising. 35 Fed. Reg. 12,671 (Aug. 8, 1970).

The rule-making was suspended when eight tobacco manufacturers voluntarily agreed to disclose the ratings produced by the FTC protocol. That rating system was ultimately proven to be flawed. (See Mass. Dept. of Public Health, "1997 Cigarette Nicotine Disclosure Report" January 16, 1998). In what appears to be a response by the industry to allay the public's concerns over the 1964 Surgeon General's report, the industry began marketing a lower yielding cigarette. Specifically, the so-called "light cigarettes" employ a technique called filter ventilation, in which nearly invisible holes are drilled into the filter paper making the paper more porous. This design defeats the ability of the FTC smoke measurement machine to test the actual levels because the tar and nicotine are vented away before they would reach the machine's sensors. Thus, the actual levels reported would be lower than they appear when the cigarette is not inhaled in the exact same manner as the Cambridge Filter test.

The placement and arrangement of these filtration holes themselves correspond precisely with the way in which smokers tend to hold and finger cigarettes as they smoke. Most smokers cover the holes with their fingers, blocking any ventilation and permitting the full amount of tar and nicotine to be ingested into the body. Hence the tendency of most smokers to block these ventilation holes allows smokers to compensate for nicotine losses that would otherwise result from tar reducing modifications. The Massachusetts Report concluded that "filter ventilation in cigarette design defines 'light' and 'ultra-light' rather than the amount of nicotine in the cigarette itself." Id. at 3. The report further stated that a "smoker will likely block at least some of the filter vents on a 'light' or 'ultra-light' cigarette, breathing in more of the dangerous and addictive substances in the smoke." Id. at 9.

In addition to understating the tar and nicotine levels, the FTC test then in use failed to

distinguish the salt bound nicotine which can be readily absorbed by the human body from the free nicotine in cigarette smoke which is more potent. Taking advantage of this test failure, defendant Philip Morris began adding ammonia, thereby raising the pH level of the smoke and, as a result, increasing the amount of free or more potent nicotine in the smoke delivered to the user. (Report of R.J. Reynolds, " Implications and Activities Arising From Correlation of Smoke ph with Nicotine Impact, Other Smoke Qualities and Cigarette Sales," at Plaintiff's Exh. J, pp.1-3).

A third device used to manipulate nicotine levels in cigarettes is through the use of reconstituted tobacco. (Report of Brown & Williamson Tobacco Corporation, Management Abstract, Dr. R. R. Johnson, "The Unique Differences of Philip Morris Cigarette Brands" February 14, 1984, at plaintiff's Exh. I). Reconstituted tobacco is an amalgamation of tobacco stalks, stems, floor sweepings and dust. These materials are treated and are then combined to form a sheet to which nicotine is directly applied. Thus the manufacturers are able to control the level of nicotine in the cigarette.

In October 1999, Philip Morris used its website, "www.philipmorris.com," to disclaim any inference that may be drawn by smokers from the words "light" or "ultra-light" cigarettes.

> [T]hese terms are commonly referred to as 'descriptors' and facilitate consumers' ability to distinguish among different product offerings. Descriptors are generally used as a point of comparison (with attributes such as strength of taste and flavor, and tar and nicotine measured by a machine method) for a cigarette brand in a particular country in order to distinguish it from other brands on the market...Smokers should not assume that brand descriptors 'light' or 'ultra Light' indicate with precision either the actual amount of tar and nicotine that they will inhale from any particular cigarette or the relative amount as compared to competing cigarettes. Some researchers report that consumers who smoke 'light' cigarettes inhale as much tar and nicotine as from full-flavor brands." (emphasis added). PhilipMorris U.S.A./Philip Morris International, Tobacco Issues "Understanding Tar and Nicotine Numbers"<http://www.philipmorris.com>

The above representations, according to the plaintiff's deposition, form the basis for her

claims of fraudulent concealment by the tobacco companies and manufacturing defects in their products. But the reports and studies in support of these claims did not come to light until after April, 1998 when defendants produced these documents under a protective order that prohibited plaintiffs from publishing or disseminating them without prior court authorization. State ex re. Humphrey v. Philip Morris C1-94-8565 (Minn. Dist. Ct. Dec. 16, 1997) Order with Respect to Non-Liggett Defendants'Objections to the Special Master's Report; Mulderig, Wharton, Cecil, "Tobacco Cases May Be Only the Tip of the Iceberg for Assaults on Privilege" 67 Defense Counsel Journal 16 (January 2000). Consequently, the information disclosed in 1998 or later could not be the impetus for a determination to file suit in May, 1997.

VI. DISCUSSION

A. Discovery Rule

It is plaintiff's contention herein that, although she was diagnosed with lung cancer in 1993 and knew it was caused by tobacco smoke, she had no knowledge of an actionable claim against the tobacco defendants until the Attorneys Generals of the various states publicized their suit four years later. Plaintiff argues in her brief that she is qualified for application of the discovery rule since she has a product liability case and that a preliminary hearing under Lopez v. Swyer, 62 N.J. 267, 300 A.2d 563 (1973) is necessary to determine, under equitable principles, when her cause of action accrued. In Lopez, the Court remanded the matter to the trial judge for a factual determination as to the time when plaintiff learned that her medical problems may have been caused by the negligence of her radiologist during radiation treatments. The unanimous Court gave the following guidance as to when such a preliminary hearing is appropriate:

> [W]here credibility is not involved, affidavits, with or without depositions, may suffice; it is for the trial judge to decide. The issue will be whether or not a party, either plaintiff or counter-claimant is equitably entitled to the benefit of the discovery rule. All relevant factors and circumstances should be considered. The determinative factors may include but need not be limited to: the

> nature of the alleged injury, the availability of witnesses and written evidence, the length of time that has elapsed since the alleged wrong doing, whether the delay has been to any extent deliberate or intentional, whether the delay may be said to have peculiarly or unusually prejudiced the defendant. The burden of proof will rest upon the party claiming the indulgence of the rule." Lopez, at 275-276.

Therefore, the right to a preliminary hearing is dependent on whether there is a factual dispute as to the date of discovery. But Lopez went on to articulate a two pronged test to determine the date of discovery, holding that "in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Id., at 272. Even though plaintiff is aware of the injury, the cause of action may not accrue until he or she is aware that the claim is *actionable*. In this case, while counsel initially requested a Lopez hearing that request was later waived.

The discovery rule, an equitable principle, was first adopted in New Jersey in 1961. See Fernandi v. Strully 35 N.J. 434, 173 A.2d 277 (1961). The rule, if applicable, enables a court to extend the limitations period for the accrual of a cause of action. The rule has been applied in a variety of circumstances. See Diamond v. N.J. Bell Telephone Co., 51 N.J. 594, 242 A.2d 622 (1968)(installation of a conduit damaged plaintiff's sewer line and the damage was not discovered until nine years later); New Market Poultry Farms, Inc. v. Fellows, 51 N.J 419, 241 A.2d 633 (1968)(a cause of action against an engineer/land surveyor for negligent miscalculation of acreage did not accrue until eleven years later when the error was discovered); Jarusewicz v. Johns-Manville, 188 N.J. Super. 638, 458 A.2d 156 (Law Div. 1983)(the cause of action accrued two years after plaintiffs were made aware that their pulmonary symptoms were caused by asbestos exposure); Graves v. Church & Dwight,Inc., 225 N.J. Super. 49, 541 A.2d 725 (App. Div. 1988)(a product liability cause of action accrued against a drug manufacturer only after the consumer was aware of the causal connection between the medication and the injury); Mancuso v.

Mancuso, 209 N.J. Super. 51, 506 A.2d 1253 (App. Div. 1986)(a passenger in an automobile accident was held entitled to the benefit of the discovery rule when the injuries sustained turned out to be more serious than initially thought).

In Mancuso, Judge Pressler isolated the two elements that allow a plaintiff to invoke the discovery rule. She wrote:

> There are two common threads running through all these cases in which the discovery rule has been applied. First, as a matter of conceptual and technical eligibility for application, the cause of action itself is one subject to a period of limitations measured by accrual rather than by the occurrence of an objective event. [citations omitted] Second, the circumstances in each of the cases before the court have strongly militated towards the grant to plaintiff of equitable relief. This is so since the discovery rule, although conceptually based upon the expansive definition accorded to the term 'accrual', is nevertheless an essentially equitable doctrine seeking to accommodate the conflicting desiderata of repose on the one hand and, on the other, the affording of a fair opportunity to a plaintiff to seek redress for a belatedly discovered injury . . . . Id. at 56-57.

In the citations, Judge Pressler lists all the subjects to which the discovery rule is inapplicable. See Id. at 55. Product defect cases are not among them.

New Jersey Courts have held that discovery will be imputed when a claimant is aware that his or her injury may be attributed to the fault of another. The later discovery that the injury is more serious than initially diagnosed does not toll the statute. See Lapka v. Porter Hayden Company, 162 N.J. 545, 554, 745 A.2d 525, 529-530 (2000), where an employee of a chemical company alleged pulmonary disease caused by occupational exposure to asbestos. The Court held the action untimely because plaintiff knew that he was suffering from work- related respiratory problems when he filed his worker's compensation claim more than two years earlier. The specific diagnosis of asbestosis, made two years later, did not alter the limitations period because "it is not necessary that the exact nature of his injury be known so long as it objectively

appears that he is reasonably charged with the knowledge that he has an injury caused by another." Id. at 555 (quoting Ackler v. Raymark Industries, 380 Pa. Super. 183, 551 A.2d 291,293 (1988)).

In the case at bar, Ms. Lanterman's tumor was initially diagnosed by her primary care physician Dr. Ostergaard. At that time, the plaintiff told the doctor that she was a smoker and the doctor told her to quit. When she could not quit, however, Dr. Ostergaard advised her to switch to smoking the "lightest" cigarette possible. (Lanterman Dep. at 102.3-22). Shortly thereafter, the plaintiff was referred to an oncologist, Dr. Frank, and a surgeon to perform a biopsy of the tumor, Dr. Ciocon. A biopsy was performed and the tumor was removed. After the biopsy, though, the plaintiff learned that she was also suffering from lung cancer. Three doctors – Dr. Ciocon, Dr. Frank, and Dr. Herskovic (radiologist) – again told the plaintiff that her cancer was smoking related.

Despite having been told by her primary care physician and two other doctors that her tumor and her lung cancer were caused by smoking, plaintiff still maintains that she did not know her lung cancer was the fault of the company that manufactured the cigarettes that she smoked . Assuming for purposes of the summary judgment motion that plaintiff's assertions are true, under Lapka the test is not whether the plaintiff had definitive proof -- some sort of smoking gun or incriminating document from the tobacco industry -- that links tobacco use with the plaintiff's specific kind of cancer. Rather, under Lapka, discovery will be imputed when a claimant is aware that his or her injury may be attributed to the fault of another. It is unreasonable, in this court's judgment, to hold that after the plaintiff was told by three of her physicians that smoking caused her cancer, a biopsy, and the news that she now had lung cancer, that the plaintiff was unaware that her injury may be attributed to the manufacturers of the cigarettes she had been smoking for fourteen years.

The plaintiff maintains that she was unaware of the "true nature and extent of the health hazards caused by smoking, as well as the addictive nature of smoking cigarettes" until she heard a news report relating to the actions filed against the tobacco industry by certain state Attorney

General Offices. (Lanterman Cert., para 4). At the time she heard the news report, plaintiff had alerady undergone a biopsy to remove a tumor that her doctor told her was caused by smoking. Further, the plaintiff had also already been diagnosed with lung cancer – cancer which three doctors had told her was a result of her smoking. Finally, plaintiff had attempted to quit smoking, but could not. Assuming all of the plaintiff's assertions are true for purposes of this motion, the statute of limitations begins to run when the plaintiff is aware, or reasonably should be aware, of facts indicating that she has been injured through the fault of another. It is reasonable to think, in this court's judgment, that after a biopsy, learning one has lung cancer, and after numerous attempts to quit smoking that failed, one should be aware that smoking caused their cancer and the manufacturers of those cigarettes are at fault.

In Burd v. New Jersey Telephone Co., 76 N.J. 284, 386 A.2d 1310 (1978) a product defect action against a glue manufacturer accrued when plaintiff, a workman, suffered a heart attack while applying the glue to lengths of plastic pipe. Holding that a reasonable inference, not actual knowledge of the causal relationship between the heart attack and the use of the glue was the determinant, the Court wrote, "[t]he proofs need not evoke a finding that plaintiff knew for a certainty that the factual basis was present. It is enough that plaintiff had or should have discovered that he 'may have' a basis for the claim." Id. at 293.

In instances where the plaintiff could not have discovered a causal connection between the injury and the conduct of a third party within the statutory time limit, the discovery rule has been applied. Lynch v. Rubacky, 85 N.J. 65, 424 A.2d (1981) (where plaintiff belatedly learned that a persistent ankle pain was caused by medical negligence); Vispisiano v. Ashland Chemical 107 N.J. 416, 527 A.2d 66 (1987) (where plaintiff's cause of action from chemical exposure at a toxic waste site did not accrue until his suspicions were aroused that the toxic exposure was the cause of his symptoms even though no doctor had as yet confirmed those suspicions.) Savage v. Old Bridge-Sayreville Medical Group 134 N.J. 241, 633 A.2d 514 (1993)(a medical malpractice claim against physicians for improperly prescribing an antibiotic which caused permanent tooth discoloration. The cause of action did not accrue until plaintiff was aware of the physicians'

failure to heed a product warning. To be actionable the element of fault must be possible, not probable or provable); Graves v. Church & Dwight Company, Inc., 225 N.J. Super. 49, 541 A.2d 725 (App. Div. 1988) (plaintiff who suffered stomach rupture after taking sodium bicarbonate was not chargeable with knowledge of wrongdoing by manufacturer until his impression of the nature of the injury and its cause had some medical support).

This court also recognizes that the specific identity of the wrongdoer is not required to make a claim actionable. In Apgar v. Lederle Laboratories 123 N.J. 450, 588 A.2d 380 (1991), a suit against drug manufacturers for teeth discoloration caused by ingestion of antibiotics during childhood, the case was time-barred because the identities of the defendants were readily ascertainable from physician records. Id. at 456. See also Viviano v. CBS Inc. 101 N.J. 538, 503 A.2d 296 (1986)(the use of fictitious defendants "John Does" prevented the suit from being time-barred).

Where plaintiff is aware of the injury but fault is not self-evident from the injury, the inquiry is whether a reasonable person would investigate further to discover fault. Martinez v. Cooper Hospital-University Medical Center 163 N.J. 45, 74 A.2d 266 (2000)(mother of two children fathered by a man who died of peritonitis after a severe beating was entitled to benefit of discovery rule in medical malpractice claim charging hospital personnel with negligence).

By November of 1993 the plaintiff had undergone a biopsy to remove a malignant tumor and had also learned that she had lung cancer. Even assuming that the plaintiff was unaware that her injury was the fault of the company that manufactured the cigarettes she smoked, under Martinez the question is whether a reasonable person would have investigated further in order to discover who was at fault for her injury. Under Martinez, the plaintiff is unable to now invoke the discovery rule in order to preserve her design defect claim.

This Court finds further support for its holding in other jurisdictions around the country. The Eighth Circuit, for example, disposed of a limitations action brought by a smoker who had developed lung cancer. The court held that the plaintiff became aware of her condition for limitations purposes when she developed trouble breathing. Stewart v. Philip Morris, Inc. 205

F.3d 1054 (8th Cir. 2000). Similarly, the First Circuit dealt with many of the same issues addressed by plaintiff herein in Nicolo v. Philip Morris, Inc. 201 F.3d 29 (1st Cir. 2000).

In Nicolo, the plaintiff developed lung cancer from a smoking habit which she knew to be addictive. The plaintiff argued, under a continuing tort theory, that her cause of action for nicotine manipulation did not accrue until she stopped smoking. The court held that ". . . given plaintiff's knowledge that she had been 'hooked' since at least the early 1980s, any subsequent dissimulation or misrepresentation by defendants as to their intent and knowledge bore no causal relation to plaintiff's [sic] condition." Id. at 39. Plaintiff's argument that her cause of action arose only when she discovered the intentional nature of defendant's conduct was rejected with the court's statement that plaintiff knew of her addiction and the defendants caused it. The court further noted that the fact that the plaintiff did not know the degree of defendants' wrongdoing was irrelevant. Id. at 39. Similar to Kelly v. Marcantonia 187 F.3d 192, 201(1st Cir. 1999), "for a cause of action to accrue, the entire theory of the case need not be immediately apparent."

In this case, plaintiff experimented with cigarettes in approximately 1975. By 1979 the plaintiff was smoking regularly. And by the time she was in her sophomore year of college, around the age of twenty, she was smoking a pack a day and on the weekend sometimes two packs a day. At the time of the diagnosis of lung cancer, she knew her injury was caused by cigarettes. Her deposition testimony is unequivocal:

> Q. When you learned that your tumor was lung cancer, did you associate it then with your smoking?
> A. Of course, yes.
> Q. Did any of your physicians associate it, tell you that it was smoking related?
> A. From smoking, yes.
> Q. Who?
> A. Dr. Ciocon, my surgeon; Dr. Frank, my oncologist; Dr. Herskovic, My radiologist. (T 103 May 12, 1998).

The court in Nicolo wrote, "[the plaintiff] knew her addiction was attributable to

defendants. This alone put [the plaintiff] on inquiry." Id. at 39. Adopting the reasoning in Nicolo, the plaintiff in this case knew that she was addicted to cigarettes. She also knew that her tumor and her lung cancer were associated with, or caused by, smoking. Even if the plaintiff did not think her cancer and addiction to cigarettes were the fault of the manufacturer of the cigarettes she smoked, there is enough evidence to support the notion that the plaintiff would have been put on inquiry. The plaintiff cannot invoke the discovery rule where she has slept on her rights.

Even if the discovery rule is inapplicable, plaintiff suggests that she is eligible for equitable relief because she was misled or lulled into inactivity by the defendants' promotion of their so-called "light cigarettes." This might be true for fraud and/or consumer fraud, but the design was available for examination at any time.

VII. CONCLUSION

This court finds that the plaintiff knew or should have known that there may have been a basis for a claim in November 1993 when her doctors told her that smoking cigarettes had caused her cancer. This court **GRANTS** defendants' motion for summary judgment as to the design defect claim. The court, however, does not dismiss those claims based on consumer fraud or common law fraud which were not subjects of the defendants' motion for summary judgment. These claims will be permitted since they are based on defendants' duty not to deceive or to commit fraud rather than duties based on smoking and health. These duties, among others, are discussed in Izzarelli v. R.J. Reynolds Tobacco Co., 117 F.Supp. 2d. 167, 175 (D.Conn. 2000)(citing Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)) with regard to consumer fraud and common law fraud issues.